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LEGISLATIVE POWER TO PROHIBIT CERTAIN RESTRICTIVE CONDITIONS IN THE EMPLOYMENT OF LABOR.

Has a state legislature the power to prohibit stipulations in labor contracts, whereby the employee agrees not to join a labor organization during the time of his employment?

The recent negative answer to this question by the Supreme Court of the United States[1] might at first seem merely one of the many cases in which courts have been compelled, on the basis of reasonableness, to effect a compromise between the fundamental right of freedom of contract and the conflicting police power of the state, the result depending more upon the judicial attitude of mind than upon any certain course of legal reasoning. So the matter was regarded by the dissenting judges in the case.[2]

[1] *Coppage v. Kansas*, U. S. Adv. Ops. for 1914, p. 240, Holmes, Day, and Hughes, JJ., *dissenting*.

[2] Id. 248, 249, opinions of Holmes, J., and Day, J.

Such too was evidently the opinion of the public press, as indicated by a plenteous bestowal of the conventional epithets in praise or censure. In fact, however, far from being the fortuitous result of a clash of conflicting judicial tendencies, this case presents, with hitherto unequalled clearness, a sharply defined cleavage between two irreconcilable lines of constitutional interpretation.

Does the constitution afford an inflexible barrier against that species of legislation which seeks to promote the general welfare by a compulsory reapportionment of bargaining advantages between certain classes? Or, do the constitutional guarantees of liberty and property mean here, as they confessedly do in the great majority of cases, merely that liberty and property shall not be abridged in an unreasonable and arbitrary manner, nor for other than a public end? Admittedly these rights are abridged at some point by the police power and other powers of the state. Is it also true that the police functions of the state are in turn limited by a fixed boundary, beyond which the public nature of the end sought, and the reasonableness of the means used, become irrelevant inquiries? Or is the sole protection against all forms of aggression to lie in the reasonable discretion of the legislature, as approved by the judges in the exercise of that residuum of conservative sentiment surviving the contemplated process of education in the "new legal justice"?

We are not here concerned with the innumerable statutes designed to remove or mitigate certain specific consequences of an alleged oppressive inequality of economic conditions.[3] Acts regulating interest rates on loans, regulating the hours of employment, limiting the medium, or even the basis, of compensation, compelling the payment of wages up to date upon discharge, forbidding the imposition of fines, prohibiting certain contracts of an oppressive tendency, prescribing new duties of insurance, safeguarding competition, regulating business "charged with a public use," compelling the guaranty of deposits in a field admittedly open to an extensive public control,—all these are merely attempts to remove certain facts from the oppressive operation of financial inequality. They attempt no artificial equalization in the general bargaining advantages of parties. They involve no repudiation

[3] *Harbison v. Iron Co.*, 103 Tenn. 421; *R. R. Co. v. Kilpatrick*, 74 Vt. 288; for an elaborate review see *McGuire v. R. R. Co.*, 131 Iowa 340, 360 ff.

of the principle of inequality. They merely restrict its operation with reference to specific subject-matters. Here, indeed, the sole constitutional question is, May the legislature in the exercise of a sound discretion consider, first, the end an object of public concern; second, the means reasonably appropriate to the end?[4]

A very different situation is presented in the principal case. No one would contend that the prohibited condition there considered was in itself oppressive. The sole relation of the prohibitive statute to the public welfare consists in its inevitable tendency to compel the employer to deal with aggregations instead of with individuals. In this matter only could it be effective for any protective purpose. From this view-point it was much more than a removal of certain facts from the operation of economic inequality; it in effect declared that inequality *per se* inimical to the public welfare and proceeded accordingly to its enforced alteration.

Such a legislative undertaking puts to a severe test the adequacy of numerous judicial and extra-judicial utterances on the relation of individual rights and legislative powers.[5] The statements by the dissenting judges that "enactments are only to be set aside when they involve such palpable abuse of power and lack of reasonableness to accomplish a lawful end that they may be said to be merely arbitrary and capricious and hence out of place in a government of laws and not of men, and irreconcileable with the conception of due process of law;"[6] and again "if that belief" (that membership in a union is essential to a fair bargain) "whether right or wrong, may be held by a reasonable man, it seems to me that it may be enforced by law in order to establish the equality of position between the parties in which liberty of contract begins";[7] —these in substance merely reiterate the prevalent mode of expression. No objection is made to these utter-

[4] *Mugler v. Kansas,* 123 U. S. 623, 663; *Lawton v. Steele,* 152 U. S. 133, 136; *Booth v. People,* 184 U. S. 425, 429; *Otis v. Parker,* 187 U. S. 606, 608; *Lochner v. N. Y.,* 198 U. S. 45, 53; *R. R. Co. v. Interstate Commerce Com.,* 221 U. S. 612, 619.

[5] *Barbier v. Connolly,* 113 U. S. 27, 31; *Holden v. Hardy,* 169 U. S. 366, 391; *Crowley v. Christensen,* 137 U. S. 86; *R. R. Co. v. Drainage Com.,* 200 U. S. 561, 592; *Am. Land Co. v. Zeiss,* 219 U. S. 47, 66; *Noble State Bank v. Haskell,* 219 U. S. 104, 111; *Mutual Loan Co. v. Martell,* 222 U. S. 225; see Francis J. Swayze, Judicial Construction of the Fourteenth Amendment, 26 Harv. Law Rev. 1, 12.

[6] Principal case, p. 250, opinion of Day, J.

[7] Id., p. 248, opinion of Holmes, J.

ances with reference to the situation usually before the courts. Owing, however, to the fact that in nearly every litigated case the test which they apply is entirely adequate, judges have drifted into the habit of speaking as if it were not merely the usual but the universal criterion of constitutionality under the "due process" clauses.

The principal case explicitly repudiates this position. "The Fourteenth Amendment, in declaring that a state shall not 'deprive any person of life, liberty or property without due process of law' . . . recognizes 'liberty' and 'property' as coexistent human rights, and debars the states from an unwarranted interference with either. And since a state may not strike them down directly, it is clear that it may not do so indirectly, as by declaring in effect that the public good requires the removal of those inequalities that are but the normal and inevitable result of their exercise, and their invoking the police power to remove the inequalities, without other object in view. The police power is broad and not easily defined, but it cannot be given the wide scope that is here asserted for it, without in effect nullifying the constitutional guaranty. . . . The mere restriction of liberty or of property rights cannot of itself be denominated 'public welfare,' and treated as a legitimate object of the police power; for such restriction is the very thing that is inhibited by the Amendment."[8]

The holding here involved is in line with an almost unbroken course of decisions.[9] In language, however, the case is significant as an at least partial emancipation from the confusing judicial tendency above mentioned, and from the still more confusing tendency to assert, in cases of this kind, that the object in view is not a public one and therefore not germane to the police functions of the state.[10] It could hardly be maintained that the adjustment of the relations of the great industrial classes might not be, or become, or be reasonably believed to be, a matter of genuine public concern.[11] Nor could the means chosen

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[8] Id., p. 245, opinion of Pitney, J.

[9] *State v. Julow*, 129 Mo. 163; *Gillespie v. People*, 188 Ill. 176; *People v. Marcus*, 185 N. Y. 257; *State v. Kreutzberg*, 114 Wis. 530; *Adair v. U. S.*, 208 U. S. 161. Cf. *Wallace v. R. R. Co.*, 94 Ga. 732. *Contra, Davis v. State*, 30 Wkly. Law Bul. (Ohio) 342. But see *State v. Bateman*, 7 Ohio N. P. 487; unreported case, supreme court of Ohio, May 4, 1915.

[10] *State v. Kreutzberg, supra.*

[11] Cf. *Adair v. U. S., supra*, dissenting opinion of McKenna, J.

by the legislature be regarded as necessarily inappropriate to the end in view. If, as has been seriously contended and sometimes in substance held, the promotion of unionism may be an end sufficient to justify a *prima facie tort,*[12] and if, as has been held, a legislative exemption of union labor from the operation of the anti-trust laws may be upheld as a not unreasonable classification in the public interest,[13] it would be no long step to the assertion that the propagation of this form of labor is of sufficient public importance to become an appropriate subject for fostering legislation. Certainly there would be no guaranty that future judges would, on the score of reasonableness, continue to condemn such measures.

That "due process of law" is exclusive of arbitrary legislative enactments has long been a closed question.[14] Despite all the criticism that has been passed upon this interpretation, it was in truth nothing short of a logical necessity. What are the rights of liberty and property thus guaranteed? Liberty and property free from legislative control they could not be in civil society; liberty and property protected from the tender mercies of legislative caprice they must be, if the words were to have any rational and effective place in an instrument declared to be the "supreme law." The courts could not, therefore, have done otherwise than to draw the flexible and variable line between reasonable and arbitrary legislation.

But if this construction was imperatively demanded in order to effectuate the purpose of the amendment, what shall be said concerning that type of legislation which is enacted, not in capricious disregard, but in deliberate repudiation, of the rights of liberty and property, by proceeding on the assumption that these rights, with the inevitably consequent financial inequality, are themselves adverse to the public welfare? This is nothing less than an undertaking to pass judgment on the policy of the constitution itself, which, if admitted at all, could stop at nothing short of the annihilation of the constitutional limitations, unless the courts should permit themselves to drift into the logically impossible position, now sometimes suggested, of making the

[12] See *Vegelahn v. Guntner,* 167 Mass. 92, 108, dissenting opinion of Holmes, J.; *Plant v. Woods,* 176 Mass. 492, 505, dissenting opinion of same judge.

[13] *State v. Standard Oil Co.,* 218 Mo. 1. *Contra, Connolly v. Union Sewer Pipe Co.,* 184 U. S. 540.

[14] *Murray's Lessee v. Hoboken Land Co.,* 18 How. (U. S.) 272, 276.

entire question between private rights and legislative powers, one of quantity and of degree.[15]

The principal case is a marked departure in the direction of a clearer enunciation of the true meaning of the "due process" clauses of the constitution. Under its authority there can be no compromise between the constitutional language and the legislative redistribution of economic advantage. Not through a drifting transformation of social ideas, but by the self-conscious process of amendment, must such an end be achieved.

Should the amending power be confronted with such a program, the facts of the principal case would suggest a pertinent inquiry, whether legislative "equalization" may not mean the substitution of a different and perhaps more oppressive inequality.

LOST CERTIFICATES OF DEPOSIT.

Shall the owner of a lost certificate of deposit payable to the order of self and claimed by him not to have been indorsed be compelled to give a bond of indemnity to the bank before being entitled to receive the money on the certificate which had not matured when lost, but had matured before time of the trial?

This question arose in the case of the *German National Bank v. Moore*,[1] and was answered in the negative. The facts of the case were briefly these. The defendant in error, Moore, deposited at the bank the sum of $4,000 and received a certificate of deposit in this form.

> "R. H. Moore has deposited with us four thousand ($4000) dollars, payable to the order of self twelve months after date with interest to maturity only. . . . upon the return of this certificate properly indorsed."

When the depositor was about to leave on a journey he took the certificate with him. By an accident it was lost at a railway ticket office and its loss was discovered while Moore was on the train. He immediately wired and wrote the bank about his loss, giving them full particulars. He made an unsuccessful effort to find the certificate. After the certificate became due, he demanded payment of the bank, but the latter refused unless the depositor would furnish an indemnity bond. This Moore was unable to do. Moore testified that the certificate was unindorsed

[15] See *Noble State Bank v. Haskell, supra*, 110.

[1] 173 S. W. (Ark.) 401.